IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPLICATION No. 3189 of 2007.

Abdul Razak Husain Pathan @ Baba ..Applicant.

Vs.

The State of Maharashtra ..Respondent.

Mr Ayaz Khan with Ms Nilofer Saiyed, Advocates, for the Applicant.

Ms S. D. Shinde, A.P.P for the State.

CORAM: V. C. DAGA,J.
DATED: 24.10.2007

P.C.:-

1. Heard Mr Ayaz Khan with Ms Nilofer Saiyed, learned Advocates, for the Applicant and Ms S. D. Shinde, learned A.P.P for the State.

2. Perused application and material available on record.

FACTS WITH SUBMISSIONS:
---

3. The applicant is seeking bail under Section 439 of the Cr.P.C. in a prosecution faced by him under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 ("the N.D.P.S.Act" for short), contending that as per the prosecution case, the contraband weighing 25 grams was sent for chemical

analysis but the office of the Chemical Analyser (C.A.) has received envelope containing 22.1 grams of the contraband sample. In view of this difference in weight, the possibility of the tampered sample in the hands of Analyser cannot be ruled out. On this material prayer for bail is based.

. In support of above submission, learned counsel relied on following judgments:-

4. **Abdul Rashid vs. The State of Maharashtra (1999 (2) Crimes 362) Bombay High Court (DB).** In this case, 20 grams of Charas was sent for analysis but as per the evidence of the Chemical Analyser Charas received was only 16 grams and, therefore, benefit was given to the accused and the accused was acquitted. It was decided on merits and not at the stage of bail.

5. Another judgment relied upon is in the case of **Amina Abdul Shaikh vs. State of Maharashtra, 1993 Mh.L.J. 1703**. The third case relied upon is unreported judgment in the case of **Johara Salim Sheikh Vs. The State of Maharashtra in Criminal Appeal No. 468 of 2001** decided on 5.2.2004 by the learned Single

Judge of this Court.

6. Some other judgments cited on the same line need no reference. Learned counsel for the applicant has also relied upon the judgment of the Apex Court in the case of **Rajesh Jagdamba Avasthi Vs. State of Goa, (2006) 1 S.C.C. (Cri) 150** in support of his submission which takes more or less similar view.

7. Learned counsel for the applicant, in all fairness, has also brought to my notice one more judgment of the Apex Court in the case of **Madan Lal and another v. State of Himachal Pradesh, 2003 Cri.L.J. 3868** and tried to distinguish the same on facts. He, thus, submits that impugned order passed by the Special Judge under the N.D.P.S.Act while rejecting application of the applicant for bail is liable to be set aside and applicant needs to be enlarged on bail.

8. Per contra, learned counsel appearing for the State strongly opposed the application for bail contending that there is no evidence to show that sample sent to the C.A. and received by his office was in any way tampered

with. According to him, seals were intact. Mere minor difference in weight cannot lead to the conclusion that the sample was tampered with or came to be substituted. She further submits that reduction in moisture content can also lead to reduction in weight of the sample. According to her, one of the cause could be using two different types of scales. She further submits that at the stage of bail, consideration sought to be pressed into service can hardly be said to be relevant. Proper exlanation leading to reduction in weight could be furnished during the course of trial while establishing the identity of the sample sent to C.A. In her submission, the accused has to face trial and prove his innocence. According to her, this slender consideration cannot be allowed to be pressed into service at this stage.

CONSIDERATION:-

---

9. Having heard rival parties, before considering the rival submissions, one has to turn to the Law laying down the parameters which are followed while considering application for grant of bail moved by the accused involved in the offences under the N.D.P.S.Act. In this behalf, readily

available judgments of the Apex Court are in the case of **Union of India Vs. Thamisharasi and others (JT 1995 (4) SC 253) followed in the case of Narcotics Control Bureau v. Dilip Pralhad Nemade, 2004 Cri.L.J. 1815** which lay down that under Section 37 of the N.D.P.S.Act no accused can be released on bail when the application is opposed by the Public Prosecutor, unless the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any other offence while on bail. Let me consider this application on these parameters.

10. Learned Single Judge of this Court in the case of **Mohammad Sheriff Vs. State of Maharashtra 2005 (2) Bom.C.R. (Cri) 594** had an occasion to consider Division Bench's Judgment reported in the case of **Abdul Rasid Vs. State of Maharashtra (1998 Bom. C.R. (Cri) 289;** wherein, the question with regard to the discrepancy in the weight of the sample seized and the one sent to the Chemical Analyser was required to be dealt with. The Division Bench in the case of **Abdul Rashid (supra)** found that the infirmity in the weight was serious one, therefore, benefit of doubt

was given to the accused, that too, after full trial. Apart from this on the careful scrutiny of the said decision one finds that no explanation was offered by the prosecution regarding discrepancy in the weight of the sample sent to the C.A. This has been, specifically, so observed in para (5) of the said judgment.

11. The learned Single Judge in the case of **Mohammad Sheriff (supra)** observed that two samples of 24 grams each were separated by means of small balance, and were packed and sealed. Two samples, marked S1 and S2, were sent to the C.A. The sample that was received by C.A. was found more in weight by 5 grams. The submission thus, was made that the sample which was analysed by the C.A., was not the sample which was taken and sent to C.A. On this count the acquittal was claimed. This submission was turned down by the learned Single Judge holding that discrepancy in weight alone could not be a ground for acquittal in the absence of any positive evidence to establish that the sample was tampered with. In the said judgment learned Single Judge took a judicial notice of the fact that the office of the Chemical Analyser

uses the scientific scale; whereas, the prosecuting department uses a small ordinary balance which normally gives rise to variation in weight.

12. In the case of **Madan Lal (supra)** the Apex Court, while dealing with more or less similar contention, observed as under:

> "18. Coming to the plea that there was reduction in weight of the samples sent for analysis and there was tampering, it has to be noted that this aspect has also been considered by the trial Court which has recorded the reasons for rejecting the same. It has been noted that the seals were intact and there was no tampering. The view has been endorsed by the High Court. On considering the reasoning indicated that there was very minimal and almost ignorable variation in weight, we find no reason to interfere with the findings."
>
> (Emphasis supplied)

13. So far as the judgment in the case of **Rajesh Jagadamba Awasthi Vs. State of Goa (supra)** on which strong reliance was placed by the applicant/accused, the varation in weight was substantial; as such, benefit of doubt was given to the accused by the Apex Court. In my considered view, this judgment of the Apex Court, on facts is of no help to the applicant.

14. In the present case, material on record clearly shows that there was no tampering with the sample which was received by the C.A. Because of some small discrepancy in the weight of sample, it cannot be said that sample was sent to C.A. was either tampered with or stood substituted.

15. The act of sending the sample packet to the C.A. is an official act done in official capacity, which the prosecuting department keep on regularly performing, such presumption can be rebutted only by way of evidence led during the course of trial and not merely relying on the small variation in the weight of the sample. Possible explanation can be offered in the trial.

CONCLUSION:-

16. In the above view of the matter, no reasonable ground exists for believing that the accused is not guilty of the offence alleged merely relying on the material leading to the small variation in the weight. I find no reason to take view contrary to the view taken by learned Special Judge, while rejecting prayer for bail.

17. In the result, application for bail is dismissed for the reasons recorded herein as well for the reasons assigned by the learned Special Judge under N.D.P.S. Act with which I concurr without any reservation.

(V.C. DAGA,J)